HUP SAN TIMBER TRADING CO. SDN. BHD. v. TAN AH LAN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Chang Min Tat F.JJ.) November 6 & 30, 1978]

[Kuala Lumpur — Federal Court Civil Appeal Nos. 47 & 49 of 1978]

Practice and Procedure — Trial — Party absent but producing medical certificate — Medical certificate not in proper form — Doubt as to inability to be present — Adjournment should have been granted.

In these cases the respondent had agreed to carry goods for or in connection with the appellant's logging business. The respondent sued the appellant for breach of the agreement and also for damages for services rendered. At the trial appellant was absent but produced a medical certificate from a Singapore private medical practitioner. The medical certificate was not in the prescribed form. The learned trial judge allowed the respondent to adduce evidence and to sign judgment. The appellant appealed.

Held: as the learned trial judge was in some doubt as to the real reason behind the inability of the appellant to attend court, he should have allowed an adjournment to enable both parties to be given an opportunity to be heard. Any delay occasioned by what appeared to be an inadequate reason for absence could be compensated by an award of appropriate costs.

FEDERAL COURT.

Thara Singh for the appellant.

S. Sivasubramanian for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): These two appeals are between the same parties and arose out of two agreements entered into between the parties both on February 10, 1974.

In Civil Appeal No. 47/78, the respondent/plaintiff had agreed for reward to carry goods for or in connection with appellant/defendant's logging business. Respondent was suing for damages for breach of the agreement, alleging that appellant had failed to or refused to employ the plaintiff as carriers but had employed others as carriers. The action came up for hearing on March 14, 1978. Plaintiff and counsel were present. So was appellant's counsel but appellant was absent. A medical certificate issued by a Singapore private medical practitioner was tendered.

Counsel for respondent objected on the ground that it was not in accordance with P.U.(A) 376 which was in a prescribed form, which *inter alia* required the doctor signing to state what the patient was suffering from in addition to the fact that he was unfit to attend court. The learned judge felt that this was to prevent malingering. The medical certificate produced Exhibit P(1) did not state what the patient was suffering from, but merely that he would be unfit to attend to duty for 3 days — from the 13th to the 15th (of March), the very two days on which the two connected suits had been fixed for hearing.

The learned judge "strongly suspected" that the medical certificate and the absence of the appellant on the day of the trial was not just coincidence. He had formed his suspicions because of what counsel for respondent had stated, it would appear, from the Bar. It seems that in another case in Johore Bahru appellant had failed to attend court on the date of hearing, advancing as an excuse the fact that he had been barred i.e. by the immigration authorities from entering this country, in consequence of which evidence *de bene esse* was taken from him in Singapore and adduced in evidence.

We are unable to understand exactly why the learned judge subsequently proceeded under Order 36 rule 31, because at page 24 of the Grounds it looks very much as if he had two possibilities for appellant's absence in mind *viz.* (i) he was really indisposed as stated in the medical certificate or (ii) he had difficulties with the immigration authorities and therefore was unable to enter this country.

We would with respect say that either of these reasons would be sufficient grounds for an adjournment of the hearing.

In Civil Appeal No. 49 of 1978, an action for damages for services allegedly rendered by respondent/plaintiff to the appellant came up for hearing on the following day (March 15, 1978). The same counsel represented the parties and the same reason advanced by appellant's counsel for his absence. On identical grounds respondent/plaintiff was allowed to adduce evidence and to sign judgment.

No doubt failure by appellant to obtain a medical certificate containing the appropriate information in a form so prescribed as to remove suspicion that he was trying to delay proceedings has inclined the learned trial judge to allow this rather drastic measure. But it seems to us that in this instance the judge was in some doubt as to the real reason behind his inability to attend court. On occasions of doubt such as the present one the guiding principle should be that both parties should be given an opportunity to be heard. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate costs.

We would therefore allow this appeal, set aside the order made by the court below. Cost of this appeal to the appellant in any event.

Appeal allowed.

Solicitors: *Wong & Paramjothy; S. Sivasubramanian.*

ALEYKUTTY JAMES v. SYED PUTRA BIN SYED OMAR SHAHABUDIN & ANOR.

[O.C.J. (Gunn Chit Tuan J.) March 10, 1978]

[Alor Star — Civil Suit No. 609 of 1977]

Practice and Procedure — Appearance and defence filed out of time — Facts in dispute — Applicability of O. 12 r. 22, R.S.C. 1957 — R.S.C. 1957, O. 3 r. 6, O. 12 r. 22, O. 27 r. 11.

The plaintiff alleged that she was the lawful tenant of a piece of land together with the school building erected on it and that the said building was controlled premises. The defendants were the registered co-owners of the said land and school building which were transferred to them by their mother, *A*, in or about November 1977. The plaintiff claimed that she had been the monthly tenant of the land and school building since January 1968 paying a monthly rental to *A* until November 1977 and she had paid the rent due for December 1977 to *A* as agent of the defendants. The plaintiff claimed *inter alia*, for an injunction to restrain the defendants from taking possession of or evicting the plaintiff

from the school building. The writ of summons with the statement of claim was served on the first defendant on December 21, 1977. Both the defendants failed to enter appearance within eight days after service of the writ on them and a certificate of non-appearance was extracted on January 5, 1978. The plaintiff had on the same day taken out a notice of motion for an order that final judgment be entered against the defendants. The notice of motion was fixed for hearing on January 28, 1978. After the notice of motion was served on the defendants, they filed an appearance through their solicitors on January 23, 1978 and a statement of defence of February 25 was also filed. Hearing of the notice of motion was adjourned twice to March 10, 1978. The defendants had also filed a summons-in-chambers dated March 2, 1978.

Held: (1) the proper procedure in this case would be that laid down in Order 12 rule 22 of the Rules. It was obvious that the defendants could appear at any time before judgment;

(2) as they had entered appearance it was necessary to consider whether they should be entitled to further time for delivering their defence;

(3) in the circumstances the defendants would be allowed one week from the date of the order to file their statement of defence.

Cases referred to:-

(1) *Redditch Benefit Building Society* v. *Roberts* [1940] Ch. 415; [1940] 1 All E.R. 342, C.A.
(2) *Webster* v. *Myer* (1884) 14 Q.B.D. 231.
(3) *Gill* v. *Woodfin* (1884) 25 Ch. D. 707, C.A.
(4) *Gibbings* v. *Strong* (1884) 26 Ch. D. 66, C.A.
(5) *Montague* v. *Land Corporation* 56 L.T. 730.
(6) *Thomas* v. *Booty, Edwards & Partners* [1964] M.L.J. 359, 360.

CIVIL SUIT.

A. Jayadeva for the plaintiff.

A.S. Sandhu for the defendants.

Cur. Adv. Vult.

Gunn Chit Tuan J.: On December 19, 1977, the plaintiff, a married woman, filed a writ of summons accompanied by a statement of claim under Order 3 rule 6 of the Rules of the Supreme Court, 1957, claiming the following reliefs against the defendants: —

(1) a declaration that the plaintiff is the lawful tenant of the defendants in respect of the piece of land comprised in S.P.K. No. 15567 Portion No. 349 situate in the locality of Telok Wanjah, in the Mukim of Alor Malai, District of Kota Setar and the school building erected thereon.

(2) an injunction restraining the defendants, their servants and agents from taking possession of or in any way evicting the plaintiff from the said land and school building without an Order of the Court.

Alternatively

(3) an order that the defendants do pay to the plaintiff the sum of $52,500 being special damages.

(4) general damages for loss.

(5) any further or other order as the court deems fit or proper.

(6) costs.

In the statement of claim the plaintiff pleaded that she is the lawful tenant of the said piece of land together with the school building erected thereon and that the said building is a controlled premises under the Control of Rent Act, 1966 as it was erected prior to January 30, 1948. The defendants are the registered co-owners of the said land and school building which were transferred to them by their mother, Tengku Aminah binti Almarhom Sultan Abdul Hamid in or about November 1977. The plaintiff also claimed that she has been the monthly tenant of the land and school building since January 1968 paying therefor unto the said Tengku Aminah a monthly rental of $300 until November 1977 and has also paid the rent due for December 1977 to Tengku Aminah as agent or representative of the defendants who became the registered proprietors on November 26, 1977. According to the plaintiff the defendants have refused and still refuse to acknowledge and attorn her as the lawful tenant of the said land and school building and have by their servants or agents wrongly re-entered into and evicted her from part of the school building without obtaining any order of court for eviction. The plaintiff also claimed that she is the owner of the school desks, furnitures, etc. in the school building and has between 1968 and 1977 expended a total sum of $52,500 in maintaining the land and the school building and in erecting the school canteen, office building, toilets, bridge and fencing, particulars of which were set out in the statement of claim. According to her the defendants re-entered part of the school building in or about November 1977 by leasing the same to other persons without having lawfully terminated or obtained any order of court to evict her. As a result she has suffered general damages and special damages amounting to $52,500.

The writ of summons with the statement of claim was served on the first defendant on December 21, 1977 and on the second defendant on December 22, 1977. As both the defendants did not enter an appearance within eight days after service of the writ on them, a certificate of non-appearance was extracted on January 5, 1978.

The plaintiff had also on January 5, 1978 taken out a notice of motion for an order that final judgment be entered against the defendants (a) for a declaration that the plaintiff is the lawful tenant of the defendants in respect of the land and school building and (b) for an injunction restraining the defendants from taking possession of or in any way evicting the plaintiff from the said land and school building. The notice of motion was fixed for hearing on January 28, 1978. After the notice of motion was served on the defendants, they filed an appearance through their solicitors on January 23, 1978 and a statement of defence dated February 25 was also filed. Hearing of the notice of motion was adjourned to February 25, 1978 and was apparently on the application of counsel for the defendants finally adjourned to March 10, 1978. The defendants had also filed a summons-in-chambers dated March 2, 1978 applying for leave to enter appearance and to file a statement of defence notwithstanding lapse of time and this application was also fixed for hearing on March 10, 1978. When both counsel appeared before me in Penang, they requested that both the notice of motion and summons-in-chambers be heard together in Open Court. Mr. Jayadeva, counsel for the applicant/plaintiff, who tendered a written submission, also informed the court that the plaintiff was abandoning her claim for damages and only sought a declaration in terms of paragraph (1)

of the indorsement on her writ of summons. He referred to Order 12 rule 22 of the Rules of the Supreme Court, 1957, which states that: —

"a defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the court or a judge shall otherwise order, be entitled to any further time for delivering his defence",

and pointed out that the defendants had to file their statement of defence within 22 days of the service of the writ and statement of claim i.e. by January 13, 1978. The defence filed in this case was out of time. Counsel contended that in a case where the party served with the writ does not appear within the time limited for appearance, then upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party had appeared. Counsel also referred to page 108 of the Annual Practice 1958 and contended that by Order 27 rule 11 the plaintiff may set down the action on motion for judgment and such judgment shall be given as upon the statement of claim the court or judge shall consider the plaintiff to be entitled. He also referred to page 612 of the said Annual Practice 1958 and correctly pointed out that a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice of motion for judgment. In such a case, the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done.

Counsel for the defendants conceded that the defendants had filed their appearance and statement of defence out of time but also referred to Order 12 rule 22 of the Rules of the Supreme Court, 1957. He also referred to page 108 of *Mallal's* Supreme Court Practice under the commentary of "Time for appearance" and pointed out that an appearance may be made at any time before the judgment is actually signed. Thus a defendant, who, not having entered an appearance comes before the court on the day when an order for judgment is being sought against him, must be allowed to enter an appearance if he desires to do so and to defend the action. Reference was made to the case of *Redditch Benefit Building Society* v. *Roberts*[1] in which it was held by Clauson L.J. that the court should not allow a plaintiff to enter judgment against a defendant for default of appearance when the defendant, whether he has technically appeared or not, is personally or by his legal representative before the court and anxious to put himself in a position to defend the action.

Counsel for the defendants, Mr. Ajmeer Singh, also referred to the following passages in the *Annual Practice 1957* at pages 151 and 446 respectively: —

"Judgment in default may be signed at any time after the time for appearance has expired provided the defendant has not in the meantime entered an appearance; but if a year has elapsed since writ served, and the plaintiff has taken no step, a month's notice to proceed must be given before signing judgment. (*Webster* v. *Myer*[2])"

and

"A defence delivered after the proper time cannot be disregarded, even though it is not delivered until after the plaintiff has served notice of motion for judgment under this Rule. (*Gill* v. *Woodfin*[3]) In such a case the court will have regard to the contents of the defence delivered out of time, and deal with the case in such a manner that justice can be done. (*Gibbings* v. *Strong*[4]); *Montagu* v. *Land Corporation*,[5] etc."

In this connection the following dictum of Earl of Selborne L.C. in the case of *Gibbings* v. *Strong*[4] is apt: —

"and if a defence has been put in, though irregularly, I think the court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply (under rule 14) to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits."

Having considered the arguments of both counsel, I considered that the proper procedure in this case would be that laid down in Order 12 rule 22 of the Rules of the Supreme Court, 1957. It is obvious that the defendants could appear at any time before judgment. In this case they have in fact entered appearance on January 21, 1978 before there was any judgment. As they have entered appearance after the time limited by the writ for appearance it was necessary of course to consider whether they should be entitled to further time for delivering their defence. In accordance with the above-quoted authorities, I therefore proceeded to consider the statement of defence which was filed by the defendants on February 25, 1978. Even counsel for the applicant/plaintiff did not dispute the correctness of that step as he too in his written submission also referred to the statement of defence filed in which the defendants have pleaded '*inter alia*' that the said land was registered in the name of Tengku Aminah binti Almarhom Sultan Abdul Hamid with effect from February 13, 1952. The land was acquired by Tengku Aminah's late husband, Datuk Syed Omar Shahabudin, hereinafter referred as "the deceased", who had constructed the school building and furnished and equipped the school. The deceased appointed a retired teacher to manage the school. The defendants have averred that the school building is not a controlled premises under the Control of Rent Act, 1966 as it was built in the year 1952. In or about the middle of September 1977 the said Tengku Aminah agreed to transfer the land as a gift to the defendants and eventually executed a valid transfer of the land in November 1977. The defendants wrote to the plaintiff on September 22, 1977 to determine the plaintiff's tenancy on December 31, 1977. The plaintiff received the letter but did not attorn tenancy until January 1, 1978. The defendants further averred that the plaintiff, who was only paying a rental of $300 per month, was unable to run the school herself and eventually sublet it to the Persatuan Belia Bimbingan on January 1, 1975 for a monthly rental of $1,400. Since the plaintiff had failed to attorn tenancy before the termination of the notice given by the defendants, the defendants eventually allowed the Persatuan Belia Bimbangan to run the said school under the name of Aminah English School.

Looking at the pleadings filed, it was therefore clear that it is a disputed fact as to whether the premises in question are rent-controlled. It was also an issue as to whether the plaintiff's tenancy had been

effectively terminated by the notice given by the defendants to her in September 1977. These issues can only be decided by a court after evidence has been adduced.

Apart from the above issues, counsel for the applicant/plaintiff also referred to sections 206(1)(a), 206(2), 213(1), 213(1)(b), 213(2), 215(1), 215(3), 215(3)(b), 216(1)(a) and (b), 216(2) and 227(2) of the National Land Code and contended that the plaintiff's tenancy did not cease when Tengku Aminah transferred the land to the defendants who took it subject to the plaintiff's tenancy which was granted by Tengku Aminah. Without considering this argument of counsel, and even if it was accepted as correct, yet it was conceded by counsel for the applicant/plaintiff that it is still a disputed fact whether the land and building in question are controlled premises under the Control of Rent Act, 1966. Although counsel for the applicant/plaintiff has contended that the notice given by the defendants before they had any interest in the said land was not a valid notice to determine the tenancy, yet in my opinion it was still an issue to be decided by the court after hearing arguments on the law as to whether the plaintiff's tenancy had been effectively terminated. Here I would respectfully agree with the following dictum of Wylie C.J. (Borneo) in the case of *Thomas* v. *Booty, Edwards & Partners*[6] when His Lordship said: —

"Moreover it is a waste of time to shut out a defence, because immediately judgment was given in default the defendant would apply to set it aside. An order would be granted if there is a defence and the defendant had (not), in effect, been refused an opportunity for the court to hear his side of the case. We are concerned only with the application of rules of procedure. These applications should not amount to a denial of the principles of justice. It is for these reasons that extensions of time are usually granted as a matter of course unless there are very strong circumstances to show that these are delaying tactics of some major feature. . . ."

Having considered all the circumstances of this case I therefore decided, in exercise of the powers under Order 12 rule 22 of the Rules of the Supreme Court, 1957, to make an order to allow the defendants one week from the date of the said order to file their statement of defence on payment of costs thrown away. The said order was made on the defendants' application by way of summons-in-chambers dated March 2, 1978. I made no order on the applicant/plaintiff's notice of motion, except at the request of her counsel, I ordered that costs connected with the said notice of motion be paid by the defendants to the plaintiff in any event.

Order accordingly.

Solicitors: *Jayadeva & Kamal; Ajmeer Singh Sandhu & Co.*

MAT DESA BIN SALLEH v. ANG HOCK LEE & ANOR.

[O.C.J. (Syed Agil Barakbah J.) April 29, 1978]
[Alor Star — Civil Suit No. 26 of 1975]

Damages — Quantum — Leg injuries — 1" shortening — General damages awarded $28,000.00.

The plaintiff, a private in the Malaysian Army, claimed damages against the defendants for injuries sustained by him, due to a motor accident involving the second defendant's taxi (driven by the first defendant) and the plaintiff's motorcycle.

The plaintiff suffered the following injuries:— (1) Laceration on right leg and foot; (2) fracture of the right fibula above which was a lacerated wound 3" x 2" on lower third with about 2" of the bone protruding out of the wound; (3) Compound comminuted fracture on mid shaft of right tibia and (4) fracture of lateral condyle of right tibia. There was also 1" shortening of his right leg. At the time of the accident, the plaintiff received a monthly salary of $420 and a housing allowance of $64.00.

Held: the defendants were solely liable for negligence. The plaintiff was therefore awarded $28,000 general damages (being $18,000 for pain and $10,000 as probable loss of future earnings) and $1,300 as agreed for special damages.

Cases referred to:-

(1) *Foong Nan* v. *Sagadevan* [1971] 2 M.L.J. 24.

(2) *Rahmat bin Shwall* v. *Basheer Ahmad & Anor.* [1977] 1 M.L.J. lxxx.

(3) *Chua Thye Peng* v. *Yeo Soo Hwee* [1967] 1 M.L.J. lxi.

CIVIL SUIT

Baldev Singh Bhar for the plaintiff.

Peh Swee Chin for the defendants.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is a claim for damages by the plaintiff, a private attached to the 8th Royal Malay Regiment, Terendak Camp, Melaka for damages due to injuries sustained by him as a result of a motor accident at or near the 40th milestone, Sungai Patani/Butterworth road on April 1, 1973 at about 9.30 p.m. He was riding a motor-cycle BJ 7275 from the direction of Sg. Patani towards Tikam Batu. The 1st defendant was driving a Mercedes-190 taxi as servant or agent of the 2nd defendant, from the opposite direction proceeding towards Sg. Patani. An accident took place between the two vehicles somewhere near a left hand bend as one travels in the same direction as the plaintiff. At the time of the accident, the area was dark, there being no street lights, the weather was fine and the road was dry. The plaintiff alleges the accident occurred due to the negligent driving of the 1st defendant. Particulars of the alleged negligence are provided at paragraph 4 of the Statement of Claim.

The defendants, on the other hand, deny such negligence and aver that it was caused entirely and/or contributed to by the negligence of the plaintiff.

Mr. Baldev Singh appeared for the plaintiff and Mr. Peh Swee Chin, for both defendants. The Agreed and Further Agreed Bundles of Documents are produced and marked Exhibits A, A1 and A2 and the Agreed Statement of Facts is marked Exhibit B.

At the commencement of the proceeding, both counsel agreed to the claim for special damages in the